

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL DISTRICT
INGHAM COUNTY

LINDA A. WATTERS, COMMISSIONER,
OFFICE OF FINANCIAL AND INSURANCE SERVICES
FOR THE STATE OF MICHIGAN,

Petitioner,

vs

File No. 03-1127-CR

THE WELLNESS PLAN,
a Michigan Health Maintenance Organization,

Hon. William E. Collette

Respondent.

MARK J. ZAUSMER (P31721)
AMY M. SITNER (P46900)
Zausmer, Kaufman, August & Caldwell, P.C.
Attorneys for Petitioner,
Rehabilitator of The Wellness Plan
31700 Middlebelt Road, Suite 150
Farmington Hills, MI 48334
(248) 851-4111

WILSON A. COPELAND II (P23837)
Grier & Copeland, P.C.
615 Griswold, Suite 400
Detroit, MI 48226
(313) 961-2600

EARLE I. ERMAN (P24296)
BARBARA A. PATEK (P34666)
Erman, Teicher, Miller, Zucker & Freedman, P.C.
Counsel for Claimants
400 Galleria Officentre, Ste. 444
Southfield, MI 48034
(248) 827-4100

**CLAIMANTS' BRIEF IN OPPOSITION TO PETITIONER-REHABILITATOR'S
PROPOSAL TO LIMIT MALPRACTICE CLAIMANTS RECOVERY TO THE
WELLNESS PLAN'S SELF-INSURANCE PLAN AND TRUST AGREEMENT**

INTRODUCTION

This brief is filed on behalf of Claimant Claudine Hicks, as personal representative of the Estate of Jermaine Hicks, deceased and Weiner & Cox, P.C., attorneys for Claudine Hicks, as personal representative of the Estate of Jermaine Hicks, deceased in the underlying malpractice

case; Claimant Byron Clark, a minor, by Treena Clark, Next Friend and Mother and Gregory & Reiter, P.C., attorneys for Byron Clark in the underlying malpractice case; and Claimants Davij'ion Clark, a Minor, and Lisa Clark, Next Friend of Davij'ion Clark, a Minor; Jaylen Bradford, a Minor and Tiffany Williams, Next Friend of Jaylen Bradford, a Minor; Jazel Taylor, a Minor and Crystal Weatherspoon, Next Friend of Jazel Taylor, a Minor; Reagan Goodman, a Minor and Jocelyn Greenwood, Next Friend of Reagan Goodman, a Minor; DeCarlo Coleman, a Minor and Karen Williams, Next Friend of DeCarlo Coleman, a Minor; Shawndra Tillman, as Personal Representative of the Estate of Miracle Brown, Deceased; Margaret Shather, as Personal Representative of the Estate of Richard Shather, Deceased; Roschawn Green, as Personal Representative of the Estate of Rashaad Lynn, and Roschawn Green, Individually; Kaurita Lamb, as Personal Representative of the Estate of Kiyjuan Lamb, and Kaurita Lamb, Individually; and Robert Hamilton, a Minor, by his Next Friend, Rosemarie Hamilton, and Rosemarie Hamilton, Individually, and The Thurswell Law Firm P.L.L.C. attorneys for Davij'ion Clark, a Minor, and Lisa Clark, Next Friend of Davij'ion Clark, a Minor; Jaylen Bradford, a Minor and Tiffany Williams, Next Friend of Jaylen Bradford, a Minor; Jazel Taylor, a Minor and Crystal Weatherspoon, Next Friend of Jazel Taylor, a Minor; Reagan Goodman, a Minor and Jocelyn Greenwood, Next Friend of Reagan Goodman, a Minor; DeCarlo Coleman, a Minor and Karen Williams, Next Friend of DeCarlo Coleman, a Minor; Shawndra Tillman, as Personal Representative of the Estate of Miracle Brown, Deceased; Margaret Shather, as Personal Representative of the Estate of Richard Shather, Deceased; Roschawn Green, as Personal Representative of the Estate of Rashaad Lynn, and Roschawn Green, Individually; Kaurita Lamb, as Personal Representative of the Estate of Kiyjuan Lamb, and Kaurita Lamb, Individually; and Robert Hamilton, a Minor, by his Next Friend, Rosemarie Hamilton, and

Rosemarie Hamilton, Individually in their underlying malpractice cases. According to information provided by the Rehabilitator, these three law firms and their clients are among 27 different law firms and 50 separate claimants who have outstanding malpractice claims against Comprehensive Health Insurance, Inc., d/b/a The Wellness Plan (“TWP”). Claimants are filing this brief in response to this Court’s February 28, 2005 Order to urge that they be classified as priority 2 claimants pursuant to MCL 500.8142(1)(b). Claimants also request that their claims not be limited to funds available through TWP’s Self Insurance Plan and Trust Agreement (“Trust”), since it is highly likely that the amount of their respective claims exceed either the per claim limit established by the Trust or the aggregate amount available to satisfy claims payable through the Trust.

STATEMENT OF FACTS

The Wellness Plan (“TWP”) is a Michigan HMO. Claimants are victims of medical negligence who have claims against TWP or health care providers employed by or provided with professional liability insurance coverage under a trust agreement adopted by TWP in 1986. The malpractice claims of the Claimants on whose behalf this brief is filed include nine birth trauma claims that resulted in catastrophic and/or disabling neurologic injuries or death to their infant victims, and two wrongful death claims involving adult decedents. Most of the injuries involved in these claims are profound and, individually, they expose TWP to millions of dollars in liability for economic damages incurred by the Claimants, including medical and rehabilitation expenses, loss of earning capacity, loss of support and services.

The Rehabilitator has indicated that there are a total of 50 malpractice claims currently pending against TWP. the Wellness Plan. The Rehabilitator for The Wellness Plan has asked Claimants to present their position as to how these claims are to be prioritized and/or satisfied.

There is a self-insurance trust fund—TWP’s Self-Insurance Plan and Trust Agreement, which, as of March 31, 2005, has total funds available for disbursement in the amount of \$10,474,460.87. See Exhibit A. The Trust contains a \$100,000 per claim/\$300,000 aggregate limit for claims against physicians or other health care providers insured by the fund (“Covered Persons”), and as January 1, 1995, a per claim limit of \$3,000,000, with no aggregate, annual limit. The aggregate amount of the claims of the malpractice claimants whose interests are represented by this brief alone are likely to exceed the total amount available in the fund, and there are 39 additional malpractice claimants.

According to a 1997 amendment to the Trust Agreement, the trust funds can be used to pay expenses of administering the trust, and, in addition, its primary obligation is to pay:

- a. All covered Professional Liability Claims which any Covered Person shall become legally obligated to pay or which are payable by any Covered Person as a result of a settlement approved by the Board of Trustees, TWP or any one or more persons designated by it.
- b. All ordinary and necessary expenses and costs incurred in connection with any claims payable from the Trust Fund pursuant to this paragraph. The term ‘ordinary and necessary costs and expenses’ shall be liberally construed and specifically defined to include risk management expenses incurred by TWP and any excess liability insurance premiums incurred by TWP

See Exhibit B, 1997 Amendment to TWP’s “Self-Insurance Plan and Trust Agreement.”

In addition, the Trust is authorized but not obliged to purchase excess liability coverage for claims in excess of amounts available through the Trust, and, as set forth above, funds from the trust can be used to purchase that coverage. It appears that there may be excess coverage for some of the malpractice claims now before the court. According to a “Reserve Evaluation for

The Wellness Plan as of December 31, 2004,” prepared by the actuarial firm of Lewis & Ellis, Inc., “[T]he Wellness Plan also purchases excess insurance on a claims-made basis with a retroactive date of March 19, 1992. For the year ended December 31, 2001, the insurance was \$10,000,000 (ten million dollars) per occurrence, not to exceed \$10,000,000 (ten million dollars) per year.” See Exhibit C, Reserve Evaluation, emphasis added. The Reserve Evaluation also indicates that there is a separate excess policy that covers the professional liability of TWP’s Independent Practice Associations that policy reportedly has a \$1,000,000 limit, with a \$10,000 deductible. Exhibit C. The Reserve Evaluation contains no information about the dates of coverage for this policy or the amount (if any) of excess coverage purchased by the plan to cover claims made after December 31, 2001, and it is unknown, at this time, how many of the malpractice claimants now before this Court will be covered by an excess policy purchased by the Trust. The Reserve Evaluation also indicates that a policy with limits of \$200,000 per claim/\$600,000 aggregate per year was purchased for the Trust on February 15, 2004. Exhibit C. It is not clear whether this policy is a claims made or occurrence policy, or whether amounts available under the policy would be available to the malpractice claimants and their counsel now before the Court.

This is Claimants brief seeking a determination that their claims are Class 2 under MCL 500.9142(1)(b), and as such, should have priority over other claimants; and furthermore, that because of this priority, their claims should not be limited to amounts available through the Trust, if, as appears likely, the amounts available through the Trust are inadequate to satisfy their claims.

ARGUMENT

MCL 500.8142 sets forth the basis upon which creditors of TWP are entitled to recover amounts owed to them. MCL. 500.8142(1) classifies claimants by priority, and determines the order in which claims are to be satisfied when an insurer is operating under a plan of rehabilitation. Pursuant to MCL 500.8142(1), “Every claim in each class shall be paid in full or adequate fund retained for their payment before the members of the next class receive payment.”

Under MCL 500.8142(1)(b), “Class 2” claims are defined as, . . . “all claims under policies for losses incurred, including third party claims . . .” Under MCL 500.8138(1), a third party may assert, “a cause of action against an insured of an insurer in liquidation. . .” In this case, under the provisions of the insurance code governing HMO’s, an HMO is statutorily obliged to maintain malpractice insurance, as a condition of continuing to operate. MCL 500.3559(3). MCL 500.3559(3) further provides that an HMO, “shall obtain the commissioner’s prior approval before self-insuring for . . .[malpractice]. . . coverages.” Id. In this case, TWP (then Comprehensive Health Services, Inc.) obtained that approval in 1986, and has funded and maintained a Self-Insured Plan and Trust Agreement. See Exhibit D, Letter of Deputy Insurance Commissioner, November 31, 1986 and Exhibits A and B.

As an HMO, TWP is also a deliverer of health care benefits to its members. According to the Insurance Code, "Health Maintenance Organization" means an entity that does the following:

- (i) Delivers health maintenance services that are medically indicated, directly or through contracts with affiliated providers . . .

MCL 500.3501(f)(i).

In this case, TWP employed physicians to provide care directly to its enrollees, and some of those enrollees were injured as a direct consequence of TWP's employee's malpractice.

Because TWP is self-insured, it is not only an insurer, by virtue of its status as an HMO, it is an insured, as a direct deliverer of health maintenance services and through the Trust Agreement that provides coverage for malpractice claims against TWP and TWP's employed and independent providers. Claimants, as injured parties who have all “incurred a loss,” are, indisputably third parties who are, therefore, entitled to Class 2 priority under MCL 500.8142(b). Claimants’ claims must, therefore, be satisfied prior to the payment of any claims of general creditors or other lower priority Claimants. Nothing in the statute governing these proceedings or the Trust itself limits or channels Claimants’ claims to the funds available under the underfunded Self-Insurance Plan and Trust Agreement.

It is well-settled under Michigan law that, “laws applicable to insurance are to be liberally construed in favor of the policyholders, creditors and the general public. Statutes relative to insurance will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice, to favor public convenience and to oppose all prejudice to public interest.” *Allen v. Michigan Property & Casualty Guaranty Association*, 129 Mich App 271, 274 (1983). See also, *Yetzke v. Fausak*, 194 Mich App 414, 421, *lv den*, 414 Mich 884 (1992).

Claimants, here, are individuals who have suffered catastrophic and unexpected injuries as a result of the negligence of TWP or one or more of its providers. Unlike general creditors who may have claims for amounts unpaid pursuant to contracts or other agreements, these Claimants were not in a position to “evaluate the financial stability of the insurance company and to have any control over the time at which their claims against the company may arise.” *Allen*,

supra at 274, citing *Metry, Metry, Sanom & Ashare v. Michigan Property and Guaranty Ass'n*, 403 Mich 117, 121 (1978). Under the legislative scheme establishing the priority of claims that is set forth in MCL 500.8142(1), these claimants have “incurred losses” not as a result of arms’ length transactions, but rather, as the result of unexpected catastrophes that TWP was recovered by law to insure against.

RELIEF REQUESTED

WHEREFORE, these Claimants respectfully request that the Court:

- A. Order, consistent with the plain language of MCL 500.8142(1)(b), that the claims of malpractice claimants before this Court be classified as Class 2 priority claims;
- B. Order the Rehabilitator, through its counsel to provide Claimants with copies of all policies of insurance referred to in the Trust Agreement and/or the Reserve Evaluation of Lewis & Ellis, Inc., including any excess or separate professional liability policies that exist and that may be available to help fund payment of their claims;
- C. Order that, in the absence of a determination that TWP’s Self-Insurance & Trust Agreement and policies of insurance, including excess policies purchased by or through the Trust and available to it, are adequate to cover the claims of the malpractice claimants before this Court, as Class 2 claimants, claimants are entitled to have their claims satisfied from the general assets of TWP prior to distribution of these assets to any lower priority claimants;

D. Allow counsel for these Claimants to address the Court at the hearing on this matter, which is now scheduled for June 8, 2005

ERMAN, TEICHER, MILLER,
ZUCKER & FREEDMAN, P.C.

By: _____
Earle I. Erman (P24296)
Barbara A. Patek (P34666)
Counsel for Claimants
400 Galleria Officentre, Ste. 444
Southfield, MI 48034
Tel: 248/827-4100
Fax: 248/827-4106

DATED: May 2, 2005

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Rehabilitator of The Wellness Plan
31700 Middlebelt Road, Suite 150
Farmington Hills, MI 48334
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400 Galleria Officentre, Ste. 444
Southfield, MI 48034
(248) 827-4100

CERTIFICATE OF SERVICE

The undersigned, being sworn, states she served papers as follows:

1. Document served: Claimants' Brief in Opposition to Petitioner-Rehabilitator's
Proposal to Limit Malpractice Claimants Recovery to The
Wellness Plan's Self-Insurance Plan and Trust Agreement

2. Served Upon: Amy M. Sitner, Esq., Zausmer, Kaufman, August & Caldwell,
P.C., 31700 Middlebelt Road, Suite 150, Farmington Hills, MI
48334
by e-mail and first class mail
- Wilson A. Copeland II, Grier & Copeland, P.C., 615 Griswold,
Suite 400, Detroit, MI 48226
by first class mail
3. Date of service: May 2, 2005

GRACE SAFKO
Erman, Teicher, Miller,
Zucker & Freedman, P.C.
400 Galleria Officentre, Ste. 444
Southfield, MI 48034
(248) 827-4100